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In the Supreme Court of the United States

OCTOBER TERM, ~~1956~~ 57

WOOSTER DIVISION OF BORG-WARNER CORPORATION,
CROSS-PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (Cross-Pet. 22–36) is reported at 236 F. 2d 898. The findings of fact, conclusions of law, and order of the Board (R. 385a–506a) [1] are reported at 113 N. L. R. B. 1288.

JURISDICTION

The judgment of the court below (Cross-Pet. 36–37) was entered on September 12, 1956. On December 8,

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[1] Record references herein are to the record filed in No. 622, this Term. In that case, the Board seeks review of the portion of the decision below denying in part enforcement of the Board's order.

1956, by order of Mr. Justice Reed, the time for filing a cross-petition was extended to and including February 9, 1957. The cross-petition was filed on February 7, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. 160 (e).

QUESTIONS PRESENTED

1. After appropriate proceedings, the International UAW–CIO Union was certified by the National Labor Relations Board as the exclusive bargaining representative of the Company's employees. In subsequent collective bargaining negotiations, the Company insisted, as a condition of agreement, that the employees' bargaining representative be identified in any agreement as "Local Union 1239, affiliated with the International Union * * *" or "Local Union 1239 of [U. A. W.]." The first question presented is whether the court below properly sustained the Board's conclusion that such insistence by the Company constituted a refusal to recognize the certified bargaining representative in violation of Section 8 (a) (5) of the National Labor Relations Act.

2. The second question presented is whether substantial evidence on the record considered as a whole supports the Board's findings that the Company violated Section 8 (a) (1) of the Act by soliciting strikers directly to abandon the strike and return to their jobs, by offering and providing free transportation for this purpose, and by suggesting that an agreement might be consummated "if the Local would forget the International," the certified bargaining representative.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et. seq.*), in addition to those set out in the cross-petition (p. 5), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interefere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

STATEMENT

A. THE BOARD'S FINDINGS AND CONCLUSIONS

The findings and conclusions of the Board, insofar as they relate to the questions presented in the cross-petition, may be summarized as follows:

1. *The violation of Section 8 (a) (5).* After appropriate proceedings, the Board, on December 18,

1952, certified the International Union, United Automobile Workers of America, CIO, as the exclusive bargaining representative of the Company's employees (R. 388a; 31a–34a). Thereafter, as more fully set forth in the Board's petition in No. 622, to which this Court is respectfully referred, the Company and the Union entered into negotiations for the purpose of arriving at an agreement covering terms and conditions of employment.

On January 23, 1953, the Union presented a proposed agreement to the Company referring to the Union as "International Union, United Automobile, Aircraft and Agricultural Implement Workers of America and its Local Union No. 1239, U. A. W.–CIO" (R. 475a; 34a, 154a). The International had chartered the Local shortly after the Board's certification had been issued (R. 239a, 240a). On February 9, the Company submitted counterproposals, dealing with so-called noneconomic issues, in which it designated the employees' representative as "Local Union 1239, affiliated with the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW–CIO)" (R. 475a; 36a–39a). The Union's representative, Pappin, told the Company representative, Adams, that this provision (the "recognition clause") "violated the certification of the Board" (R. 476a, 392a; 201a).

The Company's final proposal regarding the recognition clause was to change the designation of the contracting union from "Local Union 1239, affiliated

with the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America" to "Local Union 1239 of United Automobile, Aircraft and Agricultural Implement Workers of America" (R. 401a; 232a). The Union countered this last proposal with an offer to make its name read "the International, Local 1239" (R. 402a; 233a). However, the intent of both parties remained unchanged, the Union insisting that the International be the primary party and the Company insisting that the primary party be the Local (R. 476a–477a, 402a–403a, 234a, 352a–353a). Blythe, the Company's president and general manager, testified that the Company "did not have to" recognize the International as a party to the contract and that "the position of the company was at all times the agreement would be with the local" (R. 476a–477a, 394a–395a; 175a, 169a).

The Board found (R. 480a) that the Company's proposed recognition clause was a matter of substance, not merely one of language, and that the Company was insisting upon executing a contract with the Local to the exclusion of the International, the duly certified bargaining representative. Holding that such insistence was violative of the Act, the Board stated (R. 481a):

> The designation of representatives pursuant to a Board election, is the function of this Board. This agency, accordingly, designated and certified the bargaining agent in this case. A demand that the legal status thus obtained be bargained away cannot be countenanced if

the purposes of the statute are to be realized. What has been won through the Board's election processes need not be re-won at the bargaining table.

2. *The violation of Section 8 (a) (1).* During the strike which followed the parties' failure to arrive at an agreement, the Company advertised extensively, in the press and by radio, urging the strikers to abandon the Union's "professionals" and to return to work (R. 485a–486a, 439a; 75a–76a, 159a–165a, 181a). By advertisement and letter, the Company offered to provide, and did provide, free transportation for this purpose (R. 485a–486a, 440a; 83a, 166a, 178a–179a). Early in April, the Local's vice-president, Patterson, was visited at his home by the Company's general foreman, McCune, and its tool foreman, Hunt. They urged Patterson to return to work and suggested that an agreement might be arrived at "if the Local would forget the International" (R. 485a, 439a–440a; 265a–266a).

The Board found that the above conduct "was reasonably calculated to undermine the Union and to demonstrate to the employees that the [Company] sought to bargain with other than the certified Union," and concluded that such conduct constituted restraint and interference prohibited by Section 8 (a) (1) of the Act (R. 485a–486a).

B. THE COURT OF APPEALS DECISION

1. *The violation of Section 8 (a) (5).* The court below sustained the Board's conclusion that the Company's adamant insistence upon its recognition clause

violated its bargaining duty on the ground that representative status "is acquired by statute and is not within the area of collective bargaining" (Cross-Pet. 30). Rejecting the Company's contention that the Act does not require that the written contract embodying the agreement be made with the agent who negotiated the agreement, the court held (Cross-Pet. 30–31):

> It is a strained construction of the Act to say that the party representing the employees and negotiating such a trade agreement for their benefit is not entitled to complete the job by having the contract which it has negotiated executed with it as the representative of the individual employees for whom it is acting. Such a contract is necessarily executed with a representative of the individual employees. We fail to see the reasoning which would authorize the substitution of the Local, not the official representative of the employees, for the Union which is the official representative of the employees, over the objection of the Union. The fact that the Union offered to share this right with its Local did not give the Company the right to insist that it relinquish the right completely.

2. *The violation of Section 8 (a) (1).* The court below also affirmed the Board's findings that the Company's appeals to the employees to abandon the strike were calculated to undermine the Union's representative status. Accordingly, it concluded that these communications exceeded the permissible limits of free speech and constituted restraint and interference within the meaning of Section 8 (a) (1) of the Act (Cross-Pet. 31–32).

ARGUMENT

1. The ruling of the court below (Cross-Pet. 31) that the Company violated the Act by insisting on a recognition clause "which would authorize the substitution of the Local, not the official representative of the employees, for the Union which is the official representative of the employees, over the objection of the Union," is plainly correct and presents no question warranting certiorari.

Under Section 8 (a) (5) of the Act, an employer is under a duty to bargain "with the representatives of his employees, subject to the provisions of Section 9 (a)." Section 9 (a), in turn, provides that "Representatives designated or selected by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours, or other conditions of employment * * *." It is settled law that a union so designated is entitled not only to exclusive and unequivocal recognition as the employees' bargaining representative but also to have any collective bargaining agreement incorporated in a contract signed by the parties and to administer the contract on behalf of the employees whom it represents. *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, 525; *Ford Motor Co.* v. *Huffman,* 345 U. S. 330.

This status and the correlative rights which flow from it, as the court below correctly observed (Cross-Pet. 30), are "acquired by statute and [are] not

within the area of collective bargaining." The statutory requirement of "the signed agreement * * * as the final step in the bargaining process" (*H. J. Heinz Co., supra,* at 525) cannot be satisfied by an agreement to which the certified representative, owed the duty of recognition and negotiation, is denied the status of a party over its objection. To say that an employer may insist, over the union's objection, that the legal status thus acquired by a duly chosen and certified representative of the employees be bargained away, would mean that what a union has won through the Board's election processes must be rewon at the bargaining table. The statute clearly does not countenance such an incongruous result. *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board,* 116 F. 2d 748, 751 (C. A. 7), certiorari denied, 313 U. S. 565. See also *Douds* v. *Longshoremen's Association,* 39 L. R. R. M. 2388, 2391 (C. A. 2, February 4, 1957) (insistence on unit other than that certified by the Board as appropriate); *National Labor Relations Board* v. *Louisville Refining Co.,* 102 F. 2d 678, 680-681 (C. A. 6), certiorari denied, 308 U. S. 568 (insistence that union bargain through a local); *National Labor Relations Board* v. *Aldora Mills,* 180 F. 2d 580 (C. A. 5), enforcing 79 N. L. R. B. 1, 2 (same); *National Labor Relations Board* v. *Taormina,* 207 F. 2d 251, 254 (C. A. 5) (insistence that union secure consent of parent federation); *National Labor Relations Board* v. *Griswold Mfg. Co.,* 106 F. 2d 713, 719 (C. A.

3) (insistence that union's name be omitted from agreement). There are no contrary decisions.[2]

2. The Company's attack (Cross-Pet. 20–21) upon the Board's findings that it interfered with and restrained employees in the exercise of their statutory rights merely presents, as the cross-petition acknowledges, an issue as to sufficiency of the evidence. Certainly, in appropriate circumstances, the Board may properly find that direct appeals to employees to abandon a strike and ignore their bargaining representative during the pendency of collective bargaining negotiations are calculated to undermine the representative status of the bargaining agent and therefore violative of Section 8 (a) (1). *National Labor Relations Board* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 681 (C. A. 9); *North Carolina Finishing Co.* v. *National Labor Relations Board*, 133 F. 2d 714, 715 (C. A. 4), certiorari denied, 320 U. S. 738; *National Labor Relations Board* v. *Spiewak*, 179 F. 2d 695, 696, 697

[2] The Company's assertion (Cross-Pet. 15, 16) that the difference between the recognition clause proposed by it and that proposed by the International was "simply one of emphasis", and that the Company "merely asked * * * for *the Union's agreement*" that the Local administer the contract, overlooks the findings of the Board which the court below affirmed. As the Board found, (1) the Company's proposal was one of substance, not of semantics, and would have substituted the Local for the International as the designated bargaining agent, and (2) the Company "adamantly refused to sign any agreement which even included the certified representative as a party thereto" (R. 481a). As the Board further pointed out (*ibid.*), the International's proposal merely included "the Local as a co-party to the contract, a not uncommon practice * * *"—a proposal, moreover, which the International was free to make and the Company free to reject.

(C. A. 3). The approval by the court below of these findings involves only "a fair assessment of a record on the issue of unsubstantiality"—an issue which this Court does not normally undertake to review. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502–503.

CONCLUSION

For the reasons stated, it is respectfully submitted that the cross-petition for writ of certiorari should be denied.

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